

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KABINS FAMILY LP et al.,

Plaintiffs,

vs.

CHAIN CONSORTIUM et al.,

Defendants.

Case No.: 2:09-cv-01125-GMN-RJJ

ORDER

Two entity Plaintiffs have sued thirty-two individual and entity Defendants on forty-six causes of action related to alleged securities fraud in failed commercial real estate investments. One group of five Defendants has filed counterclaims, crossclaims, and third-party claims. Another group of four Defendants has filed counterclaims. The Magistrate Judge has granted a motion to compel Dr. Mark B. Kabins to submit to a deposition. Six motions are pending before the Court. Five motions ask the Court to dismiss counterclaims, crossclaims, or third-party claims. The sixth motion asks the Court to vacate the Magistrate Judge's order compelling Dr. Kabins' deposition. No pending motions attack the Complaint itself.

For the reasons given herein, the Court denies the Motion to Dismiss Third-party Complaint (ECF No. 208) as moot, grants the Motion to Dismiss First Amended Third-party Complaint (ECF No. 238) in part with leave to amend in part and deny it in part, grants the Motion to Dismiss Amended Counterclaims (ECF No. 262) with leave to amend in part, grants the Motion to Dismiss Amended Counterclaims (ECF No. 288) with leave to amend in part, grants the Motion to Dismiss Amended Crossclaim (ECF No. 291) with leave to amend, and denies the Motion to Vacate Magistrate Order (ECF No. 285).

1 **I. FACTS AND PROCEDURAL HISTORY**

2 **A. Facts**

3 Dr. Mark B. Kabins is the manager of MBK LLC, which is in turn the general partner of
4 Plaintiff Kabins Family LP (“Kabins LP”). (Compl. 3:1–3 & ¶ 7, ECF No. 1). Kabins LP holds
5 investments in Defendants Gila Bend 384 LLC, Michael’s Plaza LLC, and 99th & Indian School,
6 LLC. (*Id.* ¶ 9). Dr. Kabins’ wife, Lori C. Kabins, is the trustee for the Lori C. Kabins Separate
7 Property Trust (“LCK Trust”). (*Id.* 3:1–3 & ¶ 10). LCK Trust holds investments in Defendants
8 Benessere LLC (formerly Buckeye Canamex 77 One, LLC), Cipriani LLC (formerly Buckeye 80
9 West Three, LLC), Capri I LLC, and Cottonwood Retail LLC. (*Id.* ¶ 11). Plaintiffs refer to these
10 Defendant entities collectively as the “Millennium Investment Companies.” (*Id.* ¶ 206).
11 Plaintiffs refer to the Millennium Investment Companies, Defendant Millennium Commercial
12 Properties, LLC (“MCP”), and Defendant Millennium Construction, Inc. (“MCI”) collectively as
13 the “Millennium Entities.” (*Id.* ¶ 214). Defendants Modern Management, Inc. and Innovative
14 Assets, Inc. (“Innovative”) were managers of several other Defendant entities. (*See id.* ¶¶ 12–
15 205).

16 Plaintiffs allege that Defendant Chain Consortium created and managed the Millennium
17 Investment Companies for the purpose of “effecting business transactions associated with
18 obtaining investments from [Plaintiffs]” and that Chain Consortium “exerts influence or control
19 over every other Defendant through the Millennium Entities, Modern Management, or
20 Innovative.” (*Id.* ¶¶ 215–16). In other words, Plaintiffs allege that Chain Consortium is the
21 puppet master that created each and every Defendant entity and appointed each and every
22 individual Defendant manager of those entities (collectively, the “Manager Defendants”), (*id.*
23 ¶¶ 217–21), and that the Defendant entities were all alter egos of Chain Consortium, (*id.* ¶¶ 421–
24 25). Plaintiffs allege that Defendants conspired to (and did) defraud Plaintiffs out of over \$11

1 million by creating a façade of a legitimate portfolio of real estate securities. (*Id.* ¶¶ 224–25).
2 Plaintiffs’ investments however, were used simply to pay large, concealed commissions to
3 various Defendants. (*Id.* ¶¶ 226–27). Because the allegations sound in fraud, implicating the
4 heightened pleading standards of Rule 9(b), the Complaint details many misrepresentations and
5 material omissions, which will not be separately recounted here. (*See id.* ¶¶ 228–420).

6 **B. The Complaint**

7 Kabins LP and LCK Trust sued thirty-two Defendants in this Court on forty-six causes of
8 action: (1) Violations of 17 C.F.R. § 240.10b-5; (2) Conspiracy to Commit Securities Fraud; (3)
9 Civil Conspiracy; (4) Concert of Action; (5) Aiding and Abetting; (6) Intentional
10 Misrepresentation; (7) Fraud in the Inducement; (8) Fraud in the Execution or Inception; (9)
11 Fraudulent Concealment; (10) Conversion; (11) State Law Securities Fraud Under Nevada
12 Revised Statutes (“NRS”) section 90.660; (12) Negligent Misrepresentation; (13) Negligent
13 Performance of an Undertaking [Professional Negligence]; (14)–(20) Breach of Fiduciary Duty
14 (Loyalty); (21)–(27) Breach of Fiduciary Duty (Care); (28)–(34) Breach of Contract; (35)–(41)
15 Breach of the Implied Covenant of Good Faith and Fair Dealing; (42) RICO Violations, 18
16 U.S.C. § 1962; (43) Conspiracy to Violate RICO; (44) Racketeering, NRS section 207.470; (45)
17 Unjust Enrichment; and (46) Promissory Estoppel. The Complaint is 156 pages long. Some of
18 the causes of action listed are theories, doctrines, or defenses as opposed to separate causes of
19 action.

20 **C. The Benessere Defendants’ Counterclaim, Crossclaim, and Third-Party Claim**

21 On December 2, 2009, Benessere, LLC, Cipriani, LLC, Gila Bend 384, LLC, Buckeye 80
22 West Three, LLC, and Buckeye Canamex 77 One, LLC (collectively, the “Benessere
23 Defendants”) filed their Answer, Crossclaim, and Counterclaim (ECF No. 173). On January 14,
24 2010 they filed the First Amended Counterclaim (ECF No. 205) (“Benessere FACC”), asserting

1 the following causes of action against Plaintiffs: (1) Civil Conspiracy; (2) Breach of Fiduciary
2 Duty; (3) Concealment; (4) Unjust Enrichment; (5) Declaratory Relief; (6) Breach of Contract;
3 and (7) Breach of the Implied Covenant of Good Faith and Fair Dealing. On April 14, 2010,
4 Plaintiffs filed the present Motion to Dismiss Amended Counterclaims (ECF No. 262).

5 On December 9, 2009, the Benessere Defendants filed a Third-party Complaint against
6 Third-party Defendants Dr. Mark B. Kabins, Main Amundson and Associates, LLC (“Main
7 Amundson”), and James D. Main (collectively, “TPD”). TPD moved to dismiss the Third-party
8 Complaint, (*see* Mot. Dismiss, Jan. 19, 2010, ECF No. 208), and the Benessere Defendants filed
9 the First Amended Third-party Complaint (“FATPC”) on February 5, 2010, rendering the first
10 motion to dismiss moot. The FATPC pleads the following causes of action against TPD: (1)
11 Civil Conspiracy; (2) Breach of Fiduciary Duty; (3) Concealment; (4) Negligence; (5) Unjust
12 Enrichment; (6) Declaratory Relief; (7) Breach of Contract; (8) Breach of the Implied Covenant
13 of Good Faith and Fair Dealing; (9) Implied Indemnity; and (10) Contribution. TPD then filed
14 the present Motion to Dismiss First Amended Third-party Complaint (ECF No. 238).

15 On April 21, 2010, the Benessere Defendants filed the First Amended Crossclaim (ECF
16 No. 267), asserting the following causes of action against Cross-defendants Todd W. Bergman
17 and T.W.B. Enterprises, Inc.: (1) Civil Conspiracy; (2) Unjust Enrichment; (3) Conversion; (4)
18 Implied/Equitable Indemnity; and (5) Contribution. Cross-defendants have filed the present
19 Motion to Dismiss Amended Crossclaim (ECF No. 291).

20 **D. The Gutzman Defendants’ Counterclaim**

21 On December 7, 2009, Defendants Edward Gutzman III, GEIII, LLC, Benessere
22 Management, LLC, and Cipriani Management, LLC (collectively, the “Gutzman Defendants”)
23 filed their Answer, Crossclaim, and Counterclaim (ECF No. 175), and on April 20, 2010 they
24 filed the Amended Counterclaim (ECF No. 265) (“Gutzman ACC”), asserting the following

1 causes of action against Plaintiffs: (1) Breach of Contract; (2) Breach of the Implied Covenant of
2 Good Faith and Fair Dealing; (3) Fraudulent Concealment; (4) Conspiracy; (5) Breach of
3 Fiduciary Duty; (6) Unjust Enrichment; (7) Declaratory Relief; and (8) Implied/Express
4 Indemnity. Plaintiffs have filed the present Motion to Dismiss Amended Counterclaims (ECF
5 No. 288).

6 **E. Magistrate Judge's Order**

7 On April 16, 2010, the Magistrate Judge held a hearing on Defendants' Motion to
8 Compel (ECF No. 247) and verbally granted the motion. The order required Dr. Mark B. Kabins
9 to attend a deposition. Plaintiffs and Third-party Defendant Dr. Kabins have moved to vacate
10 the order.

11 **II. LEGAL STANDARDS**

12 **A. Rule 12(b)(6)**

13 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
14 that fails to state a claim upon which relief can be granted. *See N. Star Int'l v. Ariz. Corp.*
15 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
16 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
17 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See*
18 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
19 sufficient to state a claim, a court takes all material allegations as true and construes them in the
20 light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.
21 1986). The court, however, is not required to accept as true allegations that are merely
22 conclusory, unwarranted deductions of fact or unreasonable inferences. *See Sprewell v. Golden*
23 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
24 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation

1 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,
 2 550 U.S. at 555).

3 “Generally, a district court may not consider any material beyond the pleadings in ruling
 4 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
 5 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner*
 6 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents
 7 whose contents are alleged in a complaint and whose authenticity no party questions, but which
 8 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
 9 motion to dismiss” without converting the motion to dismiss into a motion for summary
 10 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence
 11 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distribs.*,
 12 *Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials
 13 outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment.
 14 *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

15 If the court grants a motion to dismiss, it must then decide whether to grant leave to
 16 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
 17 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
 18 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman*
 19 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear
 20 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*
 21 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

22 **B. Review of a Magistrate Judge’s Orders**

23 A district court may reconsider a magistrate judge’s orders on non-dispositive matters
 24 when “clearly erroneous or contrary to law.” *Grimes v. City & Cnty. of S.F.*, 951 F.2d 236, 241

(9th Cir. 1991) (quoting 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a)); *see also Rockwell Int'l, Inc. v. Pos-A-Traction Indus., Inc.*, 712 F.2d 1324, 1325 (9th Cir. 1983).

III. ANALYSIS

A. Motion to Dismiss Third-party Complaint (ECF No. 208) and Motion to Dismiss First Amended Third-party Complaint (ECF No. 238)

Because Third-party Plaintiffs (“TPP”) amended the Third-party Complaint after the motion to dismiss it was filed, the Court denies the Motion to Dismiss Third-party Complaint (ECF No. 208) as moot and addresses the Motion to Dismiss First Amended Third-party Complaint (ECF No. 238) on the merits. TPP note that one of them, Buckeye 80, has merged with another of them, Cipriani, and that another of them, Canamex, is currently in default with the Nevada Secretary of State. (*See* FATPC ¶¶ 4–5). TPD are Dr. Kabins, James D. Main, and Main Amundson. Main provided accounting services to TPP through accounting firm Main Amundson, which is now in default. (*Id.* ¶¶ 6–8).

TPP allege that Dr. Kabins and the Kabins entities, such as Kabins LP and LCK Trust (collectively, “Kabins”), are alter egos of one another. (*Id.* ¶ 12). TPP allege that Dr. Kabins signed express, written agreements (including the Operating Agreements) when he invested in Defendant entities, acknowledging the risks inherent in such investments. (*Id.* ¶¶ 13–15). TPP allege that Kabins “secretly, improperly[,] and illegally obtained a purported guarantee by [Defendants Jeff Chain and Millennium Properties Development, Inc. (“MPD”)], whereby Chain and MPD purportedly guaranteed . . . ‘there will not be a loss of principal In the case that occurs, [Chain and MPD] will make up the difference’” (*Id.* ¶ 20). TPP allege that the procurement of this promise constituted a breach of Kabins’ duty of good faith and disclosure to TPP under the Operating Agreements, because Kabins extracted the purported guarantee in exchange for not disclosing Chain’s misappropriation of money belonging to TPP, thereby

1 allowing Kabins to profit from Chain's illegal conduct. (*Id.* ¶ 21). TPP also allege that Kabins
2 violated their duty of good faith and disclosure to TPP when they voted to retain Defendant
3 Edward Gutzman III as manager of TPP, knowing that Gutzman knew of Chain's illegal
4 activities to the detriment of TPP. (*Id.*). In summary, TPP allege that because Kabins knew the
5 Operating Agreements were subject to no guarantee of any investment funds, that Kabins "traded
6 on their respective duty of disclosure and good faith to [TPP] by intentionally failing to disclose
7 Chain's improper and illegal conduct to the Membership of [TPP]" (*Id.* at ¶ 23). Main and
8 Main Amundson, TPP's own accountants, are accused of professional negligence in failing to
9 notice and/or disclose unauthorized loans or other disbursements taken by Chain, and with unjust
10 enrichment. (*See id.* ¶¶ 70–73, 82).

11 TPP bring ten causes of action against TPD: (1) Civil Conspiracy; (2) Breach of
12 Fiduciary Duty; (3) Concealment; (4) (Professional) Negligence; (5) Unjust Enrichment; (6)
13 Declaratory Relief; (7) Breach of Contract; (8) Breach of the Implied Covenant of Good Faith
14 and Fair Dealing; (9) Implied Indemnity; and (10) Contribution. Dr. Kabins has moved to
15 dismiss the nine causes of action pled against him.

16 Dr. Kabins argues that TPP cannot allege any set of facts giving rise to his personal
17 liability because he has never been a party to any contract with TPP, nor has he ever been a
18 partner, member, or shareholder of any TPP. Dr. Kabins notes that TPP have affirmatively
19 alleged that he was an "agent" for Plaintiffs, which he argues is at odds with the allegation that
20 he was an alter ego of them. In short, Dr. Kabins argues that he was only the manager of Kabins
21 LP, that he never invested his personal money with TPP, and that any actions he took as manager
22 of Kabins LP therefore cannot be imputed to him in his individual capacity. Dr. Kabins also
23 notes that some allegations are confusing or nonsensical, such as the allegation that Dr. Kabins
24 acted on behalf of TPP themselves. Dr. Kabins argues that he never owed any duty to TPP

1 except the general duty of care owed to all persons by all other persons, and that he is not alleged
2 to have breached this duty, but only a fiduciary or contractual duty that he never had. In other
3 words, as manager of Kabins LP, Dr. Kabins had a fiduciary duty to the members and
4 beneficiaries of that partnership, but not to any third-party company in which the Kabins LP
5 invested.

6 **1. Civil Conspiracy**

7 “An actionable civil conspiracy is a combination of two or more persons who, by some
8 concerted action, intend to accomplish some unlawful objective for the purpose of harming
9 another which results in damage.” *Collins v. Union Fed. Sav. & Loan Ass’n*, 662 P.2d 610, 622
10 (Nev. 1983). TPP allege that Dr. Kabins, in concert with the Kabins entities, obtained a
11 purported guarantee from Chain and MPD to make good any losses in exchange for not
12 disclosing Chain’s improper and illegal conduct. TPP allege that this agreement was improper
13 not because it was illegal to make such a guarantee or to agree not to disclose harmful
14 information (TPP do not allege that Dr. Kabins blackmailed Chain), but because it violated a
15 contractual duty under the Operating Agreements not to act in a manner that would negatively
16 affect TPP, and agreeing not to disclose the misappropriation of TPP funds would negatively
17 affect TPP.

18 However, as Dr. Kabins notes, he was not a party to any Operating Agreement in his
19 individual capacity. TPP respond that the Kabins entities are alleged to be alter egos of Dr.
20 Kabins, that he was the true principal and owner of these entities and stood to profit by their
21 success. There is a question of fact as to alter ego, and the Court will not dismiss on this basis.
22 Dr. Kabins also argues that TPP fail to allege any facts indicating (1) an intent to accomplish any
23 unlawful objective to harm another or (2) any resulting damage, which are required elements of a
24 civil conspiracy claim. *See Hilton Hotels v. Butch Lewis Prods.*, 862 P.2d 1207, 1210 (Nev.

1 1993). He therefore asks the Court to dismiss under Twombly. Because Chain was a manager
2 of the relevant Defendant entities with a fiduciary duty to their members, Dr. Kabins' and
3 Plaintiffs' agreement with Chain was potentially an unlawful conspiracy, because the objective
4 was the breach of Chain's fiduciary duties, even if Dr. Kabins and Plaintiffs had no fiduciary
5 duties of their own. Dr. Kabins is correct, however, that TPP do not allege any facts indicating
6 damages flowing from this alleged wrongdoing. It is entirely consistent with the FATPC that
7 any damage to TPP (if any) occurred as a result of Chain's alleged misappropriations before Dr.
8 Kabins was ever aware of Chain's activities. The Court therefore dismisses this cause of action,
9 with leave to amend.

10 **2. Breach of Fiduciary Duty**

11 TPP base their allegation of the existence of a fiduciary duty owed to TPP by Dr. Kabins
12 on Dr. Kabins' alleged duties under the Operating Agreements. But again, Dr. Kabins was not a
13 personal party to these agreements. In response, TPP do not point to any allegation in the
14 FATPC that Dr. Kabins signed any contract giving rise to such a duty. Even if Dr. Kabins were
15 an alter ego of Plaintiffs themselves, who entered into the Operating Agreements, Dr. Kabins
16 argues that Plaintiffs cannot have had any fiduciary duty under the agreements, because § 7.09
17 expressly prohibits members of the TPP investment companies, such as the Kabins entities, from
18 taking any part in or interfering with the management of TPP, negating any possibility of a claim
19 that the Kabins entities were somehow expected to manage TPP under a fiduciary duty. At most,
20 an attempt to interfere with management would constitute a breach of contract, not a breach of
21 fiduciary duty. The Court therefore dismisses this cause of action.

22 **3. Concealment**

23 It is not entirely clear what cause of action TPP mean to plead here. It appears to be a
24 variation of the Breach of Fiduciary Duty claim. TPP make reference to a "duty of good faith

and disclosure,” but this is vague. The claim ultimately fails because it is based on a fiduciary duty owed by Dr. Kabins to TPP, but no facts which could give rise to such a fiduciary duty are alleged. The Court therefore dismisses this cause of action.

4. Unjust Enrichment

In Nevada, the elements of an unjust enrichment claim or “quasi contract” are: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) acceptance and retention of the benefit by the defendant (4) in circumstances where it would be inequitable to retain the benefit without payment. *See Leasepartners Corp., Inc. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (quoting *Unionamerica v. McDonald*, 626 P.2d 1272, 1273 (Nev. 1981) (quoting *Dass v. Epplen*, 424 P.2d 779, 780 (Colo. 1967))). An indirect benefit will support an unjust enrichment claim. *Topaz Mut. Co., Inc. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992) (recognizing an actionable unjust enrichment claim where there was an indirect benefit conferred upon the defendant). Unjust enrichment is an equitable substitute for a contract, and an action for unjust enrichment therefore cannot lie where there is an express written agreement. *See Marsh*, 839 P.2d at 613 (citing *Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824 (Nev. 1977); 66 Am. Jur. 2d *Restitution* §§ 6, 11 (1973)).

Here, there appears to be no contract between Dr. Kabins and TPP, so there is a possibility of unjust enrichment. However, TPP conflate a claim for unjust enrichment with a claim for usurpation of a corporate opportunity. The latter cause of action would not lie here, because Dr. Kabins owed TPP no fiduciary duty. But TPP attempt to base their unjust enrichment claim on Dr. Kabins’ alleged “acquisition of financial interest and ownership in the separate undisclosed real property investments that properly should have belonged to [TPP].” (FATPC ¶ 79). This is insufficient to state a claim for unjust enrichment because it does not constitute a claim that TPP conferred any direct or indirect benefit on Dr. Kabins, but only that

1 Dr. Kabins failed to live up to a putative duty to disclose an opportunity in TPP's line of
2 business. Dr. Kabins had no such duty. The Court therefore dismisses this cause of action.

3 **5. Declaratory Relief**

4 TPP ask the Court to declare that Dr. Kabins and the Kabins entities owed TPP fiduciary
5 and contractual duties. The Kabins entities are not named as third-party defendants. Dr. Kabins
6 is not alleged to have been in any position that would give rise to a fiduciary duty; however, he is
7 alleged to have been an alter ego of the Kabins entities, which were allegedly in contract with
8 TPP. The Court therefore dismisses this cause of action with leave to amend with respect to
9 contractual duties.

10 **6. Breach of Contract and the Implied Covenant of Good Faith and Fair 11 Dealing**

12 Dr. Kabins is alleged to have been a party to the Operating Agreements with TPP because
13 he is alleged to be an alter ego of the Kabins entities. The breach of contract claim is vague,
14 however. It does not identify the contract with TPP to which Dr. Kabins (via the Kabins entities)
15 is alleged to have been a party. The "breach of contract" cause of action is confusing, as well.
16 In addition to alleging breaches of contract, it variously alleges the breach of fiduciary duties by
17 TPD and professional negligence by Main and Main Amundson. The Court therefore dismisses
18 these causes of action, with leave to amend. The contract(s) to which the Kabins entities are
19 alleged to be parties should be identified, as should the signatories to any such contract(s).

20 **7. Indemnity and Contribution**

21 Federal Rule of Civil Procedure 14 allows a defendant to implead a party who may be
22 liable to indemnify against, or contribute to, any judgment awarded against the defendant:

23 A defending party may, as third-party plaintiff, serve a summons and
24 complaint on a nonparty who is or may be liable to it for all or part of the claim
against it. But the third-party plaintiff must, by motion, obtain the court's leave if
it files the third-party complaint more than 10 days after serving its original
answer.

1 Fed R. Civ. P. 14(a)(1). A party may assert against a third-party defendant any claim “arising
2 out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the
3 third-party plaintiff.” Fed R. Civ. P. 14(a)(3). After the ten-day limit has passed, the district
4 court has discretion to allow impleader and will not be reversed absent an abuse of discretion.
5 *Sw. Adm’rs, Inc. v. Rozay’s Transfer*, 791 F.2d 769, 777 (9th Cir. 1986) (affirming denial of
6 motion to implead where it would have “complicated and lengthened” the trial). A district court
7 is to look to all relevant factors of an individual case, such as delay, whether the delay was
8 excusable, whether it would prejudice a party, whether it would unduly complicate the pending
9 case with tangential issues, and whether the third-party complaint states a claim on which relief
10 can be granted. 3 James Wm. Moore et al., *Moore’s Federal Practice* § 14.21(3) (3d ed. 2008).

11 Although a cause of action for indemnity does not arise in Nevada until the party seeking
12 indemnity has discharged a legal obligation through settlement or judgment, *Rodriguez v.*
13 *Primadonna Co., LLC*, 216 P.3d 793, 801 (Nev. 2009) (citing *The Doctors Co. v. Vincent*, 98
14 P.3d 681, 686 (Nev. 2004)), a federal court may entertain such a cause of action “prematurely”
15 so long as (1) any resulting judgment against a third-party defendant is made contingent on the
16 defendant’s payment to the plaintiff or (2) the court stays any judgment against a third-party
17 defendant until the defendant shows that it has paid the plaintiff, *Andrulonis v. United States*, 26
18 F.3d 1224, 1233–34 (2d Cir. 1994) (holding that the “may be liable” language of Rule 14(a)
19 permitted a contribution claim in federal court by a defendant even before the defendant had
20 been held liable to the plaintiff, despite New York law to the contrary).

21 TPP allege that any harm to Plaintiffs was a result of the active wrongdoing of TPD, and
22 that TPP were passive with respect to any such wrongdoing, such that TPP are entitled to
23 indemnity or contribution. Dr. Kabins argues only that TPP have not yet discharged any
24 liabilities. In Nevada state court, this may be a problem, *see Rodriguez*, 216 P.3d at 801, but in

1 federal court the federal rules control within their scope, *Hanna v. Plumer*, 380 U.S. 460, 469–70
2 (1965), and TPP may plead indemnity or contribution under Rule 14(a) before discharging any
3 liability, *see Andrulonis*, 26 F.3d at 1233–34. The Court will therefore not dismiss the causes of
4 action for indemnity and contribution.

5 **B. Motion to Dismiss Amended Counterclaims (ECF No. 262)**

6 The Benessere Defendants have alleged the following counterclaims against Plaintiffs:
7 (1) Civil Conspiracy; (2) Breach of Fiduciary Duty; (3) Concealment; (4) Unjust Enrichment; (5)
8 Declaratory Relief; (6) Breach of Contract; and (7) Breach of the Implied Covenant of Good
9 Faith and Fair Dealing. Plaintiffs have moved to dismiss. Before addressing the counterclaims
10 individually, Plaintiffs note that the Benessere Defendants fail to distinguish between the parties.
11 For example, of all the Operating Agreements one or the other Plaintiff entered into with the
12 various Benessere Defendants, only those made with Gila Bend contain the “Gila Bend Term,”
13 which prohibits members from taking part in or interfering with the management of the
14 company. (*See* Compl. Ex. 7 at 11–12, § 7.09, ECF No. 1-10). Plaintiffs argue that the
15 Benessere FACC should therefore be dismissed in its entirety under Rule 8(a).

16 **1. Civil Conspiracy**

17 “An actionable civil conspiracy is a combination of two or more persons who, by some
18 concerted action, intend to accomplish some unlawful objective for the purpose of harming
19 another which results in damage.” *Collins v. Union Fed. Sav. & Loan Ass’n*, 662 P.2d 610, 622
20 (Nev. 1983). For the same reasons the Court dismisses this cause of action as against Dr.
21 Kabins, *supra*, it dismisses it against Plaintiffs, with leave to amend. The Benessere Defendants
22 have not sufficiently pled the damage element.

23 **2. Breach of Fiduciary Duty and Concealment**

24 For the same reasons the Court dismisses these claims as against Dr. Kabins, *supra*, it

1 dismisses them against Plaintiffs.

2 **3. Unjust Enrichment**

3 Unjust enrichment is an equitable substitute for a contract, and an action for unjust
4 enrichment therefore cannot lie where there is an express written agreement. *See Marsh*, 839
5 P.2d at 613 (citing *Lipshie*, 566 P.2d at 824; 66 Am. Jur. 2d *Restitution* §§ 6, 11 (1973)).
6 Because the parties do not dispute that there were contracts between Plaintiffs and Defendants,
7 no unjust enrichment action lies here. The Court therefore dismisses this cause of action.

8 **4. Declaratory Relief**

9 The Benessere Defendants request a broad declaration of rights and duties. The Court
10 dismisses this cause of action as superfluous, because the rights and duties of the parties will be
11 adjudicated as a matter of course as the underlying causes of action are resolved. *See Roark v. S.*
12 *Iron R-1 Sch. Dist.*, 573 F.3d 556, 562 (8th Cir. 2009). There is no need to resort to a declaratory
13 judgment action.

14 **5. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing**

15 For the reasons given above, the Court dismisses these causes of action, with leave to
16 amend. The Benessere Defendants must identify which Plaintiffs are alleged to have breached
17 which agreements with which Defendants. The allegations are currently too vague under Rule 8.

18 **C. Motion to Dismiss Amended Counterclaims (ECF No. 288)**

19 The Gutzman Defendants' counterclaims are virtually identical to the counterclaims and
20 third-party claims brought by the Benessere Defendants: (1) Breach of Contract; (2) Breach of
21 the Implied Covenant of Good Faith and Fair Dealing; (3) Fraudulent Concealment; (4)
22 Conspiracy; (5) Breach of Fiduciary Duty; (6) Unjust Enrichment; (7) Declaratory Relief; and
23 (8) Implied/Express Indemnity.

24 The Gutzman Defendants allege they were not involved in any accounting activity, but

only property acquisition, development, and management. (*See* Am. Countercl. ¶ 14, ECF No. 265). Defendant Edward Gutzman himself, through his family trust, invested in five of the same Defendant entities that one or both Plaintiffs invested in, and the remainder of the Gutzman Defendants, which Gutzman himself hold interests in, managed these Defendant entities. (*Id.* ¶ 15). Upon discovering Jeff Chain’s misappropriation of funds, Gutzman himself terminated Chain’s ability to cause further damage and obtained full repayment (plus interest) of those five Defendant entities in which Gutzman had invested and whose funds Chain had misappropriated. (*Id.* ¶ 29). Chain remains in debt to several Defendant entities from which he misappropriated funds, but the Gutzman Defendants have no connection to those entities. (*Id.* ¶ 30).

The Gutzman Defendants allege that Plaintiffs and Dr. Kabins conspired with Defendant Jeff Chain and Defendant entities owned and controlled by him in the way alleged by the Benessere Defendants, i.e., that in exchange for their silence as to Chain’s misappropriations, Plaintiffs secured a promise from Chain to make good any losses his misappropriations caused. (*Id.* ¶¶ 38, 41–45). The Gutzman Defendants argue that because Chain was a manager of the relevant Defendant entities with a fiduciary duty to their members, Plaintiffs’ agreement with Chain was a an unlawful conspiracy, because the objective was the breach of Chain’s fiduciary duties. Plaintiffs move to dismiss.

1. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

For the reasons given above, the Court dismisses these causes of action, with leave to amend. The Gutzman Defendants must identify which Plaintiffs are alleged to have breached which agreements with which Defendants. The allegations are currently too vague under Rule 8.

2. Fraudulent Concealment and Breach of Fiduciary Duty

The allegations here are confusing. It appears to be a variation of the Breach of Fiduciary Duty claim. The Gutzman Defendants argue that Plaintiffs violated “co-management

1 agreements,” but it is not clear which Plaintiffs are alleged to have been parties to which co-
2 management agreements. It actually appears that only Chain and certain Gutzman Defendants
3 are alleged to have been parties to such agreements. Plaintiffs are not alleged to have been
4 managers themselves. In at least one place, the Gutzman Defendants have used the word
5 “Counterclaimants” where the word “Counterdefendants” should have been used. (*See id.* ¶ 59).
6 There may be other similar typographical errors that are not apparent. Because this cause of
7 action ultimately relies on the putative fiduciary duties of Plaintiffs to the Gutzman Defendants,
8 it stands or falls with that cause of action, which is separately pled. No facts which could give
9 rise to such a fiduciary duty are alleged. Plaintiffs are not alleged to have been managers who
10 owed a fiduciary duty to the members of any investment entity. The civil conspiracy claim may
11 rely on the violation of Chain’s own fiduciary duty, but the concealment or breach of fiduciary
12 duty claims must allege facts making plausible a fiduciary duty of Plaintiffs themselves to the
13 Gutzman Defendants. The Court therefore dismisses these causes of action.

14 **3. Civil Conspiracy**

15 For the same reasons the Court dismisses this cause of action as against Dr. Kabins,
16 *supra*, it dismisses it against Plaintiffs, with leave to amend. The Gutzman Defendants have not
17 sufficiently pled the damage element.

18 **4. Unjust Enrichment**

19 Unjust enrichment is an equitable substitute for a contract, and an action for unjust
20 enrichment therefore cannot lie where there is an express written agreement. *See Marsh*, 839
21 P.2d at 613 (citing *Lipshie*, 566 P.2d at 824; 66 Am. Jur. 2d *Restitution* §§ 6, 11 (1973)).
22 Because the parties do not dispute that there were contracts between Plaintiffs and the Gutzman
23 Defendants, no unjust enrichment action lies here. The Court dismisses this cause of action.

24 ///

1 **5. Declaratory Relief**

2 The Gutzman Defendants request a broad declaration of rights and duties. The Court
3 dismisses this cause of action as superfluous, because the rights and duties of the parties will be
4 adjudicated as a matter of course as the underlying causes of action are resolved. *See Roark*, 573
5 F.3d at 562. There is no need to resort to a declaratory judgment action.

6 **6. Implied/Express Indemnity**

7 The Gutzman Defendants allege that they are entitled to indemnity from Plaintiffs. Rule
8 14 allows a defendant to implead a party who may be liable to indemnify against, or contribute
9 to, any judgment awarded against the defendant. Fed R. Civ. P. 14(a)(1). A party may assert
10 against a third-party defendant any claim “arising out of the transaction or occurrence that is the
11 subject matter of the plaintiff’s claim against the third-party plaintiff.” Fed R. Civ. P. 14(a)(3).

12 The Gutzman Defendants allege that Plaintiffs should have to indemnify them against
13 Plaintiffs own claims, not against some other party’s claim. This cause of action is dismissed.
14 The Gutzman Defendants have not filed a third-party complaint. This is a counterclaim
15 amounting to a denial of liability and a request for fees and costs. The Gutzman Defendants
16 have denied liability and requested fees and costs elsewhere. The “indemnity” claim is
17 superfluous.

18 **D. Motion to Dismiss Amended Crossclaim (ECF No. 291)**

19 The Benessere Defendants have filed the First Amended Crossclaim (ECF No. 267)
20 pursuant to Rule 13(g), asserting the following causes of action against Cross-defendants Todd
21 W. Bergman and T.W.B. Enterprises, Inc.: (1) Civil Conspiracy; (2) Unjust Enrichment; (3)
22 Conversion; (4) Implied/Equitable Indemnity; and (5) Contribution. Cross-defendants have
23 moved to dismiss. The Benessere Defendants allege that Todd W. Bergman and T.W.B.
24 Enterprises are alter egos of one another. (*See* Am. Cross-cl. ¶ 8, ECF No. 267).

1 **1. Civil Conspiracy and Conversion**

2 The Benessere Defendants allege that Cross-defendants conspired with Jeff Chain to
3 convert money, property, and/or interests belonging to them by disguising the funds as real estate
4 commissions and/or finders fees. (*See id.* ¶¶ 11–13). They also allege that Cross-defendants
5 conspired with Plaintiffs, Chain, and MPD to conceal Chain’s and Cross-defendants’ separate
6 conversions of the Benessere Defendant’s money, property, and/or interests, (*See id.* ¶ 14–15).
7 Both the conversion and conspiracy claims are based on the alleged agreement between Plaintiffs
8 and Chain that Chain and MPD would guaranty Plaintiffs’ investments in exchange for
9 Plaintiffs’ silence about Chain’s and Cross-defendants’ alleged misappropriations of the
10 Benessere Defendant’s funds. (*See id.* ¶¶ 16, 19). The Benessere Defendants allege that Cross-
11 defendants assisted in procuring this guaranty. (*See id.* ¶ 18).

12 Cross-defendants note that Judge Philip M. Pro of this District previously dismissed the
13 crossclaims against Cross-defendants because no facts were actually alleged against them, (*see*
14 Hr’g, Mar. 26, 2010, ECF No. 255), and argue that the First Amended Crossclaim lists only two
15 such facts: (1) that Bergman received real estate commissions and/or finders fee payments; and
16 (2) that Dr. Kabins received a purported personal guaranty from Chain and MPD, (*see* Am.
17 Cross-cl. ¶¶ 13, 16). The rest of the Crossclaim consists of legal conclusions. Cross-defendants
18 are correct that the First Amended Crossclaim alleges few facts implicating Cross-defendants
19 themselves in any wrongdoing. Only the allegation that Bergman received commissions and
20 payments ties him to any events in this case at all, and it only ties T.W.B. Enterprises as an alter
21 ego. Cross-defendants are correct that there is no allegation how Cross-defendants were
22 involved in the alleged conspiracy, and that there is nothing indicating how the alleged
23 commissions and fees were wrongful. The civil conspiracy and conversion claims are dismissed
24 with leave to amend. The Benessere Defendants must allege facts indicating the elements of a

1 civil conspiracy and/or conversion, such as “Bergman agreed with Chain to assist him in
2 misappropriating funds” The facts that Chain misappropriated funds and that Bergman
3 received funds (from somewhere and for some reason) do not add up to an allegation of
4 conspiracy or conversion on Bergman’s part.

5 **2. Unjust Enrichment**

6 The Benessere Defendants allege that Cross-defendants have been unjustly enriched, but
7 they have not alleged facts making this conclusion plausible. They allege only that Bergman
8 received commissions and fees. They do not allege that he performed no work for these
9 payments or even that the Benessere Defendants are the ones who made such payments, directly
10 or indirectly. It is possible that the Benessere Defendants are attempting to allege that
11 Bergman’s payments were made out of funds misappropriated by Chain, but this is not clear. If
12 true, such an indirect benefit could support an unjust enrichment claim. *Marsh*, 839 P.2d at 613.
13 The Court dismisses this cause of action, with leave to amend.

14 **3. Indemnity and Contribution**

15 Rule 13(g) permits crossclaims for indemnity and contribution. *See* Fed. R. Civ. P. 13(g).
16 The Benessere Defendants allege that any losses caused to Plaintiffs are due in whole or in part
17 to the wrongdoing of Cross-defendants, and that the Benessere Defendants are therefore entitled
18 to indemnity or contribution. Cross-defendants argue that there are no facts pled indicating a
19 nexus or special relationship between the Benessere Defendants and Cross-defendants, as is
20 required to support a claim of indemnification or contribution. *See Rodriguez*, 216 P.3d at 802.
21 The Benessere Defendants have alleged that Cross-defendants actually caused at least a part of
22 Plaintiffs’ harm that Plaintiffs attribute to the Benessere Defendants. If this is the case, causes of
23 action lie for indemnity or contribution. However, as noted above, the Benessere Defendants
24 have not pled enough facts to support such a claim. The Court therefore dismisses these causes

1 of action, with leave to amend.

2 **E. Motion to Vacate Magistrate Order (ECF No. 285)**

3 The purposes of a deposition include discovery of information and preservation of
4 testimony. Testimony taken at a deposition is not automatically admissible, but objections are
5 not to be argued over at the deposition itself. Counsel are to make their objections on the record
6 “in a nonargumentative and nonsuggestive manner,” and then the deponent is to answer. Fed. R.
7 Evid. 30(c)(2). This is so that the trial judge has all testimony available but may consider
8 objections to it before admitting the disputed evidence at trial (or in support of a motion).
9 “Conduct that is not permissible in the courtroom during the questioning of a witness is
10 ordinarily not permissible at deposition.” *Ethicon Endo-Surgery v. U.S. Surgical Corp.*, 160
11 F.R.D. 98, 99 (S.D. Ohio 1995), *vacated on other grounds*, 93 F.3d 1572 (Fed. Cir. 1996). Only
12 a claim of privilege is a legitimate evidentiary reason to refuse to answer a question at a
13 deposition. Fed. R. Civ. P. 30(c)(2).

14 Despite the rules, deponents often refuse to answer questions even after their counsel’s
15 objections are duly noted, out of the unfounded fear that whatever they say will necessarily be
16 admissible, and perhaps out of the somewhat better-grounded fear that the opposing party will
17 use the discovered information for further research harmful to the case of the deponent. The
18 absence of any authority figure at a deposition often results in the deposition devolving into an
19 unproductive squabbling match between attorneys, including improper instructions not to answer
20 questions. *See* 7 Moore et al., § 30.43[3]. This is apparently what happened in the present case
21 when the Benessere Defendants attempted to depose Dr. Kabins.

22 In their Motion to Compel (ECF No. 247), the Benessere Defendants recounted the
23 alleged misconduct of Dr. Kabins and opposing counsel for the Magistrate Judge and requested
24 the Magistrate Judge to order Dr. Kabins to answer twenty-six questions he refused to answer at

1 the first deposition, to award reasonable attorney's fees for drafting the motion, and to award the
2 expenses of the failed deposition and the retaking of the deposition.

3 At the deposition, Dr. Kabins and his counsel frustrated questioning with "abusive and
4 harassing objections," without properly answering many of the questions. Mr. Gibson was
5 Plaintiffs' counsel, and Mr. Spilotro was Dr. Kabins' personal counsel. From the beginning, it
6 was clear that Mr. Gibson was prepared to be combative. After Mr. Massi, counsel for the
7 Benessere Defendants, gave Dr. Kabins an overview of the deposition process and explained that
8 he could answer "I don't know" or "I don't remember," Gibson remarked, "the witness will
9 answer the questions in that manner that he feels most appropriate. So I mean I appreciate your
10 lecture to the witness, but" (Kabins Dep. 11:8–10, Jan. 30, 2010, ECF No. 285 Ex. 2).
11 Counsel then argued for a page and a half worth of the transcript over how long the deposition
12 might take and whether Mr. Massi could force a two-day deposition if Dr. Kabins failed to
13 answer all of the questions during the first day. Kabins first noted that he and his wife, Lori
14 Kabins, were the general partners of Kabins LP. (*Id.* 18:14–17). The first example given to the
15 Magistrate Judge of improper behavior by the Benessere Defendants is that Plaintiffs' and Dr.
16 Kabins' counsel reacted to the following question this way:

17 Q. Alright so the both of you do, and you don't conduct formal meetings of the
18 partnership do you?

19 Mr. Gibson: Objection. Assumes facts not in evidence, argumentative and calls
20 for a legal conclusion.

21 Mr. Spilotro: It may also get into attorney/client privilege.

22 Mr. Gibson: And – and – and I'm going to instruct the witness not to answer the
23 question to the extent it involves an attorney/client privilege.

24 (*Id.* 19:10–18). Dr. Kabins repeatedly refused to answer the question of whether Dr. Kabins and
his wife ever held formal meetings of the Kabins LP partnership, the answer to which could not

1 possibly in and of itself involve any attorney–client communications. Mr. Gibson repeatedly
2 encouraged him not to answer this simple, innocuous question, making objections such as
3 “assumes facts not in evidence,” “argumentative,” “ambiguous,” and “calls for a legal
4 conclusion.” (*Id.* 19:20–21:7). The next question was just as innocuous: “[T]he partnership
5 itself, is it currently active?” (*Id.* 21:12). Mr. Gibson’s objection was unmeritorious: “Objection;
6 calls for a legal conclusion.” (*Id.* 21:13). And suggestive: “The Witness: Um, it requires a legal
7 conclusion in order for me to state.” (*Id.* 21:14–15). These are simple questions that do not
8 require legal conclusions to answer. A court may rule that a partnership does or does not exist as
9 a matter of law, but whether persons who may constitute a partnership are currently active
10 therein does not require a legal conclusion, only factual testimony. The same “legal conclusion”
11 objections are made to virtually every question asked, for hundreds of pages of the transcript,
12 and the argumentation and witness coaching continues by Mr. Gibson. (*See id. passim*). Gibson
13 continually instructs Dr. Kabins not to answer based on attorney–client privilege in many cases
14 where it does not plausibly apply. (*See id.*). An exasperated Mr. Massi at one point asks Dr.
15 Kabins to “give me . . . an example . . . of activities in the partnership that did not involve any
16 communication with your attorney.” (*Id.* 48:12–14). This is roughly one-fifth of the way through
17 the deposition. The Benessere Defendants also argued to the Magistrate Judge that Mr. Gibson
18 had selected a Saturday specifically so that the Magistrate Judge could not be reached to resolve
19 disputes.

20 The Magistrate Judge held a hearing on the motion to compel on April 16, 2010. He was
21 unimpressed with the explanations for Dr. Kabins’ and Mr. Gibson’s conduct at the deposition.
22 He grew audibly impatient with counsel’s evasions and inadequate explanations at the hearing.
23 He called the objection to one of the questions based on attorney client privilege “absolutely
24 bogus” and “frivolous.” After counsel could not identify the legal authority to object to a

1 question at a deposition for being “ambiguous,” the Magistrate Judge again used the word
2 “frivolous,” and called the hearing an “absolute waste of time.” Counsel alleged there were
3 “cases” that supported such an objection but could not cite to them, and they did not appear in
4 counsel’s brief. The Court then stopped argumentation and granted the motion in its entirety,
5 ordering Dr. Kabins to answer the objected-to questions at a deposition, as well as any questions
6 that naturally flowed from them, with no time limit and under the supervision of the Magistrate
7 Judge himself during normal business hours. (*See* Hr’g, Apr. 16, 2010, ECF No. 266).

8 The party asserting attorney–client privilege as a defense to answering a question at a
9 deposition has the burden of clearly showing the items objected to and the reasons for it. *Hisaw*
10 *v. Unisys Corp.*, 134 F.R.D. 151 (W.D. La. 1991). A deponent must answer with facts known,
11 regardless of whether those same facts happen to be memorialized in attorney work product or
12 were discussed with an attorney, so long as the content of actual attorney–client discussions or
13 the actual work product of an attorney are not revealed. *See Wilson v. Lakner*, 228 F.R.D. 524,
14 529 (D. Md. 2005); *In re Vitamins Antitrust Litig.*, 217 F.R.D. 229, 234–35 (D.D.C. 2002).

15 Plaintiffs and Third-party Defendant Dr. Kabins object to the Magistrate Judge’s order.
16 The Court denies the motion to vacate the Magistrate Judge’s order, as the order was not clearly
17 erroneous. A judge may compel a deponent to answer questions that are not properly the subject
18 of privilege, while preserving the deponent’s right to refuse to answer questions properly subject
19 to privilege. *See, e.g., In re Pasco Tobacco Co.*, 41 B.R. 394, 396 (Bankr. Pa. 1984). And in this
20 case, the Magistrate Judge will personally supervise the deposition. In this sense, the present
21 motion is unripe, because the Magistrate Judge has not made any final rulings concerning which
22 questions will still be properly subject to a claim of privilege. But even considering the ruling
23 from the hearing as final, the Magistrate Judge did not clearly err, because the vast majority of
24 questions Dr. Kabins refused to answer do not appear to plausibly implicate attorney–client

1 privilege. The few questions that might involve attorney–client communications can be properly
2 objected to at the deposition, which the Magistrate Judge will supervise. The Court will not
3 vacate the Magistrate Judge’s order.

4 **CONCLUSION**

5 IT IS HEREBY ORDERED that the Motion to Dismiss Third-party Complaint (ECF No.
6 208) is DENIED as moot.

7 IT IS FURTHER ORDERED that the Motion to Dismiss First Amended Third-party
8 Complaint (ECF No. 238) is GRANTED in part, with leave to amend in part.


9 IT IS FURTHER ORDERED that the Motion to Dismiss Amended Counterclaims (ECF
10 No. 262) is GRANTED, with leave to amend in part.

11 IT IS FURTHER ORDERED that the Motion to Dismiss Amended Counterclaims (ECF
12 No. 288) is GRANTED, with leave to amend in part.

13 IT IS FURTHER ORDERED that the Motion to Dismiss Amended Crossclaim (ECF No.
14 291) is GRANTED, with leave to amend.

15 IT IS FURTHER ORDERED that the Motion to Vacate Magistrate Order (ECF No. 285)
16 is DENIED.

17 DATED this 27th day of July, 2010.

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20 _____
GLORIA M. NAVARRO
UNITED STATES DISTRICT JUDGE
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